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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 734

WILLIAM WRIGHT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William Wright, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on October 31, 1962. The petition for rehearing was denied on December 12, 1962.

JUDGMENTS AND OPINION OF COURTS BELOW

The Judgment of the District Court for the Northern District of Illinois, Eastern Division, was entered on October 27, 1961, sentencing the defendant to imprisonment for five years. It is not reported, but appears at pages 27-28 of the Appendix certified to this Court by the Clerk of the Court of Appeals for the Seventh Circuit.

The Opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed on October 31, 1962. It has not as yet been reported but appears in the Appendix of this Petition and in the certified copy of the record of the Court of Appeals. Rehearing was denied on December 12, 1962 and the order appears in the Appendix hereto.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, § 1254(1).

QUESTIONS PRESENTED

1. Where defendant is given a right to appeal, is he not deprived of due process of law when the Court of Appeals ignores entirely the testimony of two Government witnesses which is in direct conflict with the testimony of another Government witness from whose testimony the Court of Appeals concluded that the conviction of the defendant should be affirmed?

2. Where defendant is given a right to appeal, is he not deprived of due process of law when the Court of Appeals excises from the testimony of a Government witness that portion thereof which is favorable to the defendant and which exonerates him?

3. Should the conviction of the defendant be affirmed where there is no evidence that he had knowledge of the conspiracy and where the conviction is based upon evi-

dence of association with other defendants and upon suspicion and speculation?

4. Is it not error for the prosecuting attorney to refer to the defendant's failure to take the stand where there is no evidence or testimony involving the defendant requiring his denial and to further state to the jury that "Out of one hundred and seventy million people in the United States not one witness took the stand to refute the Government's case. Not from New York or anywhere they would come?"

5. Where the Government fails to prove beyond a reasonable doubt that the defendant was guilty of the conspiracy charged in one of the counts is it not error to deny a motion in arrest of judgment pointing out that there was a misjoinder of defendants in the ten counts charging independent substantive crimes committed by the four defendants?

6. May the Government retain the fruits of a verdict obtained to a large extent by the flagrant, inflammatory and prejudicial remarks and misconduct of the prosecuting attorneys?

CONSTITUTION, RULES AND STATUTES INVOLVED.

The pertinent provisions of the Constitution of the United States, its Statutes, and of the Federal Rules of Criminal Procedure are:

Fifth Amendment to the Constitution of the United States.

Rules 8, 37(a)(1) and 52(b) of the Federal Rules of Criminal Procedure, Title 18, U.S.C.

Section 1291, Title 28, U.S.C.

Section 174, Title 21, U.S.C.

Section 4705 (a) Title 26, U.S.C.

These provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

The indictment, returned on March 16, 1960, charged Armando Pennacchio, Ben Pennacchio, Michael Carioscia, and petitioner, William Wright, with violations of Section 4705(a), Title 26 U.S.C., and Section 174, Title 21 U.S.C. Armando Pennacchio and Michael Carioscia were indicted for violations of the Narcotics Law on March 16, 1960; Counts 3 and 4 charged Michael Carioscia with similar violations on April 28, 1960; Count 5 charged the petitioner, William Wright, and Michael Carioscia, with a sale of narcotics on June 16, 1960, and Count 6 charged them with receiving, concealing and facilitating the transportation after unlawful importation of heroin, on June 16, 1960; Counts 7 and 8 charged Armando Pennacchio and Ben Pennacchio with violations of the Narcotics Law on August 29, 1960; Counts 9 and 10 charged Armando Pennacchio and Ben Pennacchio with violations of the Narcotics Law on September 6, 1960; Count 11 charged that the aforesaid defendants conspired to violate the Narcotics Law from March 16, 1960 to September 6, 1960.

Armando Pennacchio and Michael Carioscia pleaded guilty before trial. William Wright was found guilty by the verdict of a jury on Counts 5, 6 and 11 (A. 20). The jury found Ben Pennacchio not guilty on all of the counts in which he was named as a defendant, Counts 7, 8, 9, 10 and 11 (A. 20). William Wright was sentenced to serve a term of imprisonment of five years (A. 27-28). William Wright filed a motion to dismiss the indictment on the ground that it contained a fatally prejudicial misjoinder of defendants and crimes not provable by the same evidence and that the felonies charged in Counts 1, 2, 3, 4, 7, 8, 9 and 10 did not result from the same series of facts charged in Counts 5 and 6 (A. 11-12). This motion was denied (A. 14).

William Wright filed a motion in arrest of judgment for the reason: "Since the Government failed to prove that the defendant, William Wright was a conspirator as charged in count eleven of the indictment, it should not have indicted him in said count. Without said count in the indictment, the same contained ten counts charging different persons with the commission of different and separate crimes at different and separate times, to the prejudice of defendant, William Wright." (A. 22, 23.) The said motion, together with a motion for judgment notwithstanding the verdicts or for a new trial, was denied (A. 28).

THE EVIDENCE.

The record is quite lengthy consisting of about 500 pages of testimony and arguments of counsel but the facts necessary for the disposition of this petition lie within a narrow bracket.

On March 16, 1960 Bernard Theisen, a Federal Narcotics Agent, purchased a quantity of heroin from defendants Armando Pennacchio and Michael Carioscia for $3360.00 (A. 45-49). He was asked to relate a conversation between himself and Pennacchio. Wright's counsel objected because Wright was not present but upon the promise of Government counsel to connect up the conversation Theisen was permitted to relate it (A. 49). They discussed the purchase of heroin. Wright was nowhere in the vicinity when this sale took place. This sale was alleged in Counts One and Two of the indictment in which Armando Pennacchio and Michael Carioscia are named.

On March 31, 1960, Carioscia and Wright flew from Chicago to New York (A. 210-212) under assumed names, M. Luna and J. Burns, respectively (A. 240). Federal agents placed them under surveillance on their arrival in

New York. They entered a taxicab at the airport and the New York agents followed them. There was no testimony by these agents as to the activities of Carioscia and Wright beyond their ride in the taxicab and looking out the rear window (A. 244; 247).

On April 19, 1960 Theisen and Armando Pennacchio had another long conversation at which Wright was not present and to which his attorney objected. Pennacchio complained that there was a good deal of "heat" and "tails" and that he was suspicious of Theisen and had to rent two apartments in which they divided their narcotics stock so that if anything went wrong, they wouldn't lose all (A. 65-67).

It was then agreed that there would be a continuing objection (A. 67).

On April 28, 1960, the date on which the substantive crimes charged in Counts Three and Four are alleged to have been committed by Carioscia, Theisen purchased heroin from Carioscia (A. 69-70). There was no evidence that Wright was present at this sale or anywhere in the vicinity.

On May 28, 1960, Theisen and Carioscia met at the bar of the North Avenue Steak House. Theisen wanted to make a partial payment for heroin and pay the balance in a few days (A. 75-76). Theisen testified to the conversation as follows (A. 76):

> "I asked him how soon he would know and he said that he would have to talk to his man about it, that the man was right there, and he pointed to the bar, 'The man's right here.' That is what he said. And he said, 'I will talk to him about it'."

There is no testimony whatever identifying the man at the bar to whom Carioscia pointed.

Agent Joseph M. Arpaio was in the North Avenue Steak House and observed Theisen and Carioscia in the foregoing conversation (A. 152). After Theisen left, he saw Carioscia enter the restaurant portion of the Steak House and seat himself at a table to the right of William Wright; three other men were seated on the left of Wright (A. 153). Arpaio observed Wright conversing with Carioscia and also the other three men (A. 154).

The day after Theisen had the conversation with Carioscia at the bar, Carioscia phoned him and said that he talked to the guy right after Theisen left and that the consignment deal was off (A. 77). Carioscia said he would call Theisen on May 30th to find out if he had all the money, but didn't call until June 6 and explained that the reason for the delayed call was that he spotted a "tail" and was suspicious of Theisen (A. 77-78). He told Theisen that he wouldn't know until the following morning if he had enough to take care of him (A. 78).

On June 16, 1960, the date on which Carioscia and Wright are charged with selling heroin to Theisen in Counts Five and Six, Carioscia called Theisen about 5:00 P.M. and said he would call him at a North Cicero bar between 8:30 and 9:00 P.M. Theisen got there at 8:00 o'clock and Carioscia called him at 9:15 (A. 79), and asked Theisen to meet him in the Lake Club in Melrose Park. Theisen said it would take 25 to 30 minutes for him to get there. Carioscia arrived there and handed a package of heroin to Theisen who thereupon gave him $3500.00 (A. 80-81).

The petitioner was registered at the Country Club Motel under the name of J. Harris (A. 367) from May 25 through

June 2, 1960 (A. 38) and from June 13 through June 18, 1960 (A. 39).

On June 16th Federal Agent Kenneth Maxfield had the entrance to the Steak House under surveillance from about 8:00 P.M. until the early morning of June 17th (A. 216). He arrived there at that time with Agents William Durkin and Robert Taylor. Durkin left and entered the Steak House, and Agent Taylor left at about 9:15 P.M. (A. 217), but Maxfield remained and kept the Steak House under surveillance. At about 10:15 P.M. Maxfield observed a blue and white Oldsmobile pull into the parking lot of the Steak House and saw Carioscia leave that automobile and enter the Steak House. Shortly thereafter Agent Taylor rejoined him at the Steak House (A. 215). Maxfield remained across the street from the Steak House until 4:30 A.M. the following morning (A. 229). During all of this period he only saw Agent Durkin enter the Steak House (A. 229). He did not see him leave the Steak House (A. 230). Maxfield did not see William Wright at the Steak House; he did not see him leave and go into an automobile in the parking lot, nor did he see him enter an automobile in the parking lot at any time, although he had the entrance under surveillance all the time (A. 235).

Agent Robert Taylor arrived at the Steak House at about 8:00 P.M. on June 16th and parked directly across the street from the entrance where he could see everybody that went in and who came out of the Steak House. He remained from 8:00 P.M. until 9:15 P.M. and then from 10:15 P.M. until 4:30 the next morning. Between 8:15 and 9:15 P.M. he did not see Carioscia enter the Steak House (A. 259). During that period he did not see Mr. Wright (A. 260). He saw Mr. Durkin enter about 8:30

P.M. (A. 260) and saw him leave about 10:20 P.M. (A. 261).

On June 16th Agent William Durkin entered the Steak House at about 8:20 P.M. and observed William Wright and Carioscia seated at the bar (A. 338). Shortly after 8:30 P.M. he saw Wright leave the Steak House and Durkin walked to the door, looked out and observed Wright in a 1956 blue and white Oldsmobile. At 8:55 P.M. Wright returned to the bar section, gave Carioscia some keys and said everything was Okay (A. 339). Shortly thereafter Carioscia went to the telephone and returned saying the line was busy (A. 339). At about 9:15 he dialed the phone again. Then Carioscia walked out of the outside vestibule and into the parking lot; Durkin walked to the door and saw Carioscia pulling away in a 1956 blue and white Oldsmobile (A. 340). At about 9:45 P.M. Wright walked back and forth for the next twenty to thirty minutes, looking outside the door. He walked outside and came back in, and then went into the restaurant section of the Steak House where he was seated with a couple (A. 339). Carioscia returned about 10:15 and walked into the restaurant section where he talked with Wright and sat down with the man and woman Wright had been seated with earlier. (A. 341).

On August 29, 1960, the date on which the substantive crimes described in Counts Seven and Eight are alleged to have been committed by Armando Pennacchio and Benjamin Pennacchio, Theisen received a package of heroin from Armando (A. 94).

On September 6, 1960, the date on which the substantive crimes described in Counts Nine and Ten are alleged to have been committed by Armando Pennacchio and Benjamin Pennacchio, Narcotics Agent William J. Olivanti saw Armando and Benjamin standing near a group of bushes near the recreation center in Garfield Park (A. 281-

2). He saw Benjamin holding a brown paper bag in his hand (A. 282). Benjamin Pennacchio was arrested (A. 286), and Olivanti then walked back to the bushes and found a brown paper bag containing heroin (A. 286).

Agent George M. Belk executed a search warrant at the home of Benjamin Pennacchio and found fourteen $100 bills in a jewel box on the dresser in the bedroom (A. 302).

All of the exhibits of heroin were introduced in evidence (A. 398; A. 403; A. 405; and A. 406) over objection of Mr. Wright's counsel on the ground that he was not present at the time of sale, nor near the sale, and that he had no connection with them. The objection was overruled. (A. 406).

Mr. Wright's attorney moved to strike all of the conversations objected to during the trial (A. 423-6), but the Court overruled the said motion (A. 435).

REASONS FOR ALLOWANCE OF WRIT.

1 and 2.

The failure of the Court of Appeals to give effect to all of the testimony in evidence, which, if considered by them, should have resulted in a reversal of the District Court judgment, has so far departed from the accepted and usual course of judicial proceeding as to deprive the petitioner of due process of law and as to call for the exercise of this Court's power of supervision. In *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S. Ct. 582, 59 L. Ed. 969, this Honorable Court held:

> "While the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston*, 153 U.S. 684, 687; *Andrews* v. *Swartz*, 156 U.S. 272, 275; *Rogers* v. *Peck*, 199 U.S. 425, 435; *Reetz* v. *Michigan*, 188 U.S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment."

The foregoing decision was cited and followed in *Boykin* v. *Huff* (1941, Cir. D.C.) 121 F. 2d 865, 872, where the Court stated:

> "While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions.
>
> "* * * The right of appeal, though statutory, does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

Sec. 1291, Title 28, U.S.C. provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

Rule 37(a)(1) of the Federal Rules of Criminal Procedure provides: "An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate."

In *Coppedge* v. *United States*, 1962, 369 U.S. 438, 441, 82 S. Ct. 917, 919, 8 L. Ed. 2d 21, 26, this Court held:

> "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, * * *."

Since the petitioner is entitled to a review of his conviction in the United States Court of Appeals for the Seventh Circuit, the integrity of the judicial process and the Fifth Amendment to the Constitution of the United States, providing that "no person * * * shall be * * * deprived of his life, liberty or property without due process of law," demands that a *full* review of his case be given by the Court of Appeals. This means that the Court of Appeals must not ignore any of the government testimony favorable to him and that the said Court should not excise any portion of a government witness' testimony which changes the entire aspect and effect of such witness' testimony.

In its opinion the Court of Appeals stated:

> "On May 28, Agent Theisen with Oscar Luna, a special employee of the Federal Bureau of Narcotics, talked with Carioscia at the bar of The North Avenue Steak House, Chicago. Theisen told Carioscia that he did not have the full price for a quarter kilogram of heroin and asked if he could get the heroin and

pay later. Carioscia said he would have to talk to his 'man' about it, and that '*the man's right here.*' Theisen and Luna then left the Steak House, whereupon Carioscia entered the restaurant section of the establishment and talked to defendant. Wright later left with Carioscia in the latter's car and went to The Country Club Motel. About noon Carioscia telephoned Agent Theisen that he had talked to the 'guy' right after Theisen and Luna left the night before and the arrangements were off." (Italics supplied)

The *exact* conversation between Carioscia and Theisen with respect to owing a balance on a purchase of heroin appears at page 76 of the Appendix and reads:

> "I asked him how soon he would know and he said that he would have to talk to his man about it, *that the man was right there, and he pointed to the bar, 'the man's right here.'* That is what he said. And he said, 'I will talk to him about it.'" (Emphasis supplied.)

When this Court excised everything from the foregoing statement except the words "the man's right here", one could logically conclude that "the man" was in the restaurant portion of the Steak House and, since Carioscia entered the restaurant and was seen talking to Wright, that Wright was "the man." How different is the result when the *exact* words are analyzed: "The man was right there, and he pointed to the bar"; hence "the man" was *at the bar*, and not in the restaurant.

"The man" whose consent to a credit arrangement was necessary, according to Carioscia, was "*right there*" *at the bar*, and Mr. Theisen could easily have recognized him as Mr. Wright if he knew Wright *at that time*. If he didn't, he could have said at the time he testified in court that the man to whom Carioscia pointed at the bar was the same man whom he saw in the court room as defendant Wright.

The importance of the foregoing quoted paragraph appears in the arguments of government counsel to the jury:

> "And, as Agent Theisen testified, he was using his index finger *hitting the top of the bar* there at the North Avenue Steak House. Now, of course, if you use your common sense, the man does not mean the man is on top of the bar; the mere meaning of that language is that the man is here in the building in the North Avenue Steak House, the man is right here." (A. 494)

After Mr. Gladstone (Wright's attorney) argued that Carioscia pointed to the bar, government counsel, answering Mr. Gladstone, stated to the jury (A. 532):

> "Again, Mr. Gladstone indulged in a bit of *twisting of a slight fact;* again to get you down on the side road and not the main highway, the designation in this case, a possible verdict. What was it? You saw Agent Theisen when he was indicating about how Michael Carioscia pointed in this Steak House. He said he tapped his finger on the bar. He went like that (indicating) and went like that with his right hand. *And what does Mr. Gladstone have him doing? Just a little pointing. Pointing at the bar. He didn't do that.* He didn't say that. He didn't indicate that."

The foregoing argument of government counsel is based upon the same approach to Agent Thiesen's testimony as that of the Court of Appeals. In other words, by eliminating the statement of Carioscia that his "man was right there", and at the same time pointing to the bar, the government counsel could argue, just as the Court of Appeals did, that "the man" was on the premises.

But, since there is no testimony that Wright was the man at the bar, the Court of Appeals erred in concluding that Wright was Carioscia's man merely because he was sitting in the restaurant portion of the Steak House where

Carioscia talked to him. Agent Arpaio testified that after Theisen left Carioscia, he saw Carioscia enter the restaurant of the Steak House and seat himself at a table to the right of William Wright. Three other men were sitting to the left of Wright. (A. 153) Arpaio observed Wright conversing with Carioscia and *also the other three men.* (A. 154).

It thus appears that one of the other three men is more likely to have been the man at the bar toward whom Carioscia pointed.

The Court of Appeals, in its opinion, also set forth evidence of what occurred on June 16. The opinion stated that at 8:00 P.M. Carioscia's car was observed in the parking lot of the North Avenue Steak House and that Wright and Carioscia were sitting together at the bar. The opinion further stated:

> "Shortly thereafter, Wright left the Steak House, entered an Oldsmobile and was seen pulling out of the lot. He returned within an hour, walked up to Carioscia, handed him some keys, and said 'Everything is O.K.' Carioscia went to the telephone, returned and told Wright that the phone was busy. Carioscia telephoned again and talked with Agent Theisen who had been awaiting his call. He told Theisen to go to The Lake Club in Melrose Park; Carioscia then left the Steak House. Although his Pontiac was still in the lot, Carioscia drove away in the Oldsmobile and later met Theisen at The Lake Club where he delivered 235 grams of heroin.
>
> "Meanwhile, at the Steak House defendant paced back and forth, glanced out the door, walked outside, returned, and finally entered the restaurant section. About 10:15 p.m. Carioscia returned, looked around the bar, walked to the restaurant section, stood, nodded his head, and entered the restaurant where he talked with defendant."

If the foregoing excerpt from the opinion of the Court of Appeals recited the facts accurately, then the conviction of Wright on Counts Five and Six would be justified; but the Court ignored entirely the testimony of two Government witnesses, Agents Maxfield and Taylor, who had the entrance of the Steak House under constant surveillance during the period that the events related in the opinion occurred. An entirely different conclusion would have resulted if the Court of Appeals had considered the testimony of Maxfield and Taylor.

On June 16, 1960, Taylor and Maxfield were *watching the entrance door* of the Steak House. Taylor apparently arrived at his station in front of the Steak House at 8:00 P.M. and left at 9:15 P.M. (A. 217). Maxfield kept the Steak House under surveillance and saw Carioscia drive up in the 1956 blue and white *Oldsmobile* at 10:15 P.M. (A. 219).

Maxfield testified that he saw Durkin enter the Steak House at about 8:30 P.M. (A. 229), and only saw him that one time (A. 230). Maxfield did not see the defendant, Wright, at the Steak House on June 16th, nor did he see him leave the Steak House and go to an automobile in the parking lot at any time, although he had the entrance under surveillance all the time (A. 235).

Taylor testified that at about 10:00 P.M. he saw the *1956 Oldsmobile* and Carioscia's 1960 *Pontiac* in the parking lot of the Steak House (A. 253; 257). Taylor further testified he could see everybody who went in and came out of the Steak House while he was there from 8:00 P.M. until 9:15 P.M. (A. 259) but didn't see Wright. If Wright entered the Oldsmobile, as testified to by Durkin, it is strange indeed that Taylor and Maxfield didn't see that event. Surely, if Wright drove away from the Steak House in the Oldsmobile for some ulterior purpose he had to

come back, because Durkin said that shortly after seeing Wright enter the Oldsmobile Wright came back and gave Carioscia some keys and said everything is O.K. But again, the two watch-dogs, Taylor and Maxfield, didn't see Wright return and go into the entrance door of the Steak House which they had under surveillance.

It thus appears that the question of *credibility* among the Government's three witnesses, Durkin, Taylor and Maxfield, is not involved. It is something more serious than credibility. The truthfulness of Durkin's testimony is involved. Durkin's testimony was directed to convincing the jury that Wright entered the Oldsmobile, drove away for the purpose of obtaining narcotics, came back in the Oldsmobile to the Steak House, with the narcotics presumably in the Oldsmobile, handing the keys to the Oldsmobile to Carioscia and saying everything is O.K. and that shortly thereafter Carioscia entered the Oldsmobile and drove away to meet Theisen to whom he sold narcotics at about 10:00 P.M. the same day.

On direct examination Durkin definitely said that he stuck his head out the *front* door and looked out and saw Wright in the Oldsmobile (A. 339). He testified further that about 9:15 he walked to the door again and saw Carioscia pulling away in the Oldsmobile (A. 340); that he saw Wright walking back and forth looking outside of the door; and that Wright walked outside and came back in (A. 340), but neither Taylor nor Maxfield saw him in the doorway or leave the entrance of the Steak House. Both Maxfield and Taylor were assigned to watch the North Avenue Steak House (A. 356), and Durkin was the agent who gave directions to Taylor and Maxfield (A. 357). On cross-examination Durkin testified that the 1956 Oldsmobile was 40 to 50 ft. from the front door of the Steak House as one walked into the entrance (A. 359), and again testified that he *looked out* the door (A. 359).

Upon being asked, "If you were at the door, Agents Taylor and Maxfield could see you, couldn't they?," Durkin changed his testimony and said that he went to an inner entrance door but still could see the Oldsmobile 40 ft. to the left of the entrance (A. 360-1).

The testimony of Agents Maxfield and Taylor indicated most emphatically that Wright never left the Steak House and did not enter a 1956 Oldsmobile, nor drive away in the same, nor return in the Oldsmobile and re-enter the Steak House.

It is unfortunate that the Court of Appeals did not consider this evidence because it was entirely consistent with the innocence of Wright of the substantive crimes charged in Counts Five and Six. In fact, it was positive evidence of Wright's innocence of those charges.

In *Neal* v. *United States*, 8 Cir. 1939, 102 F. 2d 643, 648, the Court held:

> "Evidence which is consistent with each of two hypotheses proves neither, *Prudential Insurance Company* v. *King*, 8 Cir., 101 F. 2d 990, decided February 25, 1939; and when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction, *Shama* v. *United States*, 8 Cir., 94 F. 2d 1, 4; * * *."

The foregoing analysis calls for this Court to exercise supervisory control over Appellate Courts; and accordingly, this Court ought to exercise its jurisdiction to correct an injustice.

3.

It is obvious that the Court of Appeals has based its judgment on a series of conversations between Agent Theisen and co-defendants Armando Pennachio, Benjamin Pennacchio and Michael Carioscia, to which objections were

made by Wright's attorney (A. 49, 67, 252). In addition, Wright's attorney moved to strike each of these conversations at the conclusion of the Government's case (A. 423-426). The Court denied this motion (A. 435). The Government offered no proof that Wright was present at any of these conversations or that he authorized any of them or knew anything about them. On the other hand, the record is clear that Wright was not present at any of these conversations and they were, therefore, not admissible against Wright. Furthermore, no conspiracy was proved.

The approval by the Court of Appeals of the ruling of the trial court in permitting the jury to consider this evidence is in conflict with an opinion of the Court of Appeals for the Second Circuit in the case of *Ong Way Jong* v. *United States*, 245 F. 2d 392, at 395, in which it cited and followed a decision of this Court, *Fiswick* v. *United States*, 329 U.S. 211. It is also in conflict with the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 453, where he stated:

> "Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of the acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.*" (Emphasis supplied.)

But the Court of Appeals apparently felt that it established the existence of a conspiracy in which Wright was a member by relating a number of telephone calls between Wright and the other defendants, by association of Wright with the defendant Carioscia, and by the incidents of May 28 and June 16, 1960, heretofore discussed in points 1 and 2 hereof.

There is no testimony regarding the substance of these telephone conversations. Although Carioscia and Wright were seen engaged in conversations, no one testified that they heard the conversations. Nothing sinister appeared in the evidence that Carioscia and Wright made a trip together to New York under assumed names, other than the fact that Wright associated with a man who pleaded guilty in the case. In making such association evidence of guilt, the Court of Appeals departed from its decisions in *United States* v. *Carengella*, 7 Cir., 198 F. 2d 3, 7; *United States* v. *O'Brien*, 7 Cir., 174 F. 2d 341, 344-345; *United States* v. *Wainer*, 7 Cir., 170 F. 2d 603, 606. The *Carengella* and *Wainer* cases hold that "it takes something more than a robust suspicion to convict a defendant in a criminal case." The opinion of the Court of Appeals for the Seventh Circuit in the *Wright* case on this subject is also in conflict with the Court of Appeals for the Second Circuit in *United States* v. *Di Ri*, 2 Cir., 159 F. 2d 818, 819-820, and with the opinion of this Court in *Wiborg* v. *United States*, 163 U.S. 632, 655.

There was not a scintilla of evidence that Wright had any knowledge of the existence of the conspiracy. The Court of Appeals, however, noted: "On September 12, a short time after his arrest, defendant expressed surprise to Agent Theisen at the degree of surveillance to which he had been subjected by the federal agents during the course of the government's investigation. He also registered an

apparent complaint against one of his co-defendants by saying, 'He never did use his mind. * * * I told that guy to watch you. I told him that you were an agent.' Defendant then asked Theisen, 'How much stuff did they get Monsie (Armando Pennacchio) with?' "

The exact conversation which took place on September 12, 1960 was (A. 115-116):

> "He said to me, 'I don't know why you're after me in connection with this case. I didn't have anything to do with it.'
>
> "I didn't say anything except 'People talk too much, Bill.'
>
> "He said, 'That guy is a real ——— yo-yo. He never did use his mind.'
>
> "I said, 'Yeah.'
>
> "Then he said, 'I haven't seen him in about four months.' I said, 'That's about right.'
>
> "Then he said, 'You guys could probably pinpoint the exact day.'
>
> "And I said, 'I think we can.'
>
> "Then he said, 'I told that guy to watch you. I told him then you were an agent.'
>
> "I said what he had suspicioned earlier was right, that I was an agent.
>
> "Then he said, 'How much stuff did they get Monsie with?'
>
> "That is the name Armando Pennacchio used.
>
> "That was the extent of the conversation. After I answered him, I told him we had got him with a key in hand."

In analyzing this conversation the Court of Appeals ignored its most important content. Wright said, "I haven't seen that guy for about four months." Theisen corroborated this statement when he replied: "That's about right." Since this conversation occurred on September 12, 1960, it appears therefrom that Wright hadn't

seen "that guy" since May 12, 1960. Apparently the Court of Appeals concluded that "that guy" was Armando Pennacchio. The Court of Appeals summarizes the evidence of events occurring between July 26 and September 6, as follows:

> "On July 26, Carioscia told Agent Theisen that he was not then in a position 'to do business,' but asked him to check back the first part of August. On August 4, there were three long-distance telephone calls from Carioscia's residence to defendant's residence. On August 6, there was a long-distance telephone call from Armando Pennacchio's residence to Wright's. On August 27, Armando Pennacchio told Theisen that Carioscia and 'that other guy' had lost the 'stash' and had practically destroyed him in the last several weeks, but that he could supply a 'kilogram and a half.' On August 29, Armando Pennacchio delivered 198 grams of heroin to Theisen and on September 6, 407 grams."

There is no evidence as to who "that other guy" was. Certainly Wright could not be the "other guy" except by speculation, guess or conjecture. If Wright had not seen Armando since May 12 he could not have delivered to Armando the heroin sold by him to Theisen on August 29 and September 6. There is nothing in the record to indicate that Wright was in Chicago after June 18, the date on which he left the Country Club Motel (Gov't. Ex. 26; A. 39).

Because of the lack of knowledge by Wright of the conspiracy as disclosed by the evidence related in the opinion of the Court of Appeals, its affirmance of the judgment is in conflict with, and in disregard of the decisions of this Court in the cases of *Ingram* v. *United States*, 360 U.S. 672, 680 and *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals and has decided a federal question in a way in conflict with applicable decisions of this Court, as to call for an exercise of this Court's power of supervision.

4.

In addressing the jury, Government counsel said: "You heard the evidence from the witness stand under oath, and as to William Wright it is unrefuted and undenied. Out of one hundred and seventy million people in the United States not one witness took the witness stand to refute the Government's case. Not from New York or anywhere *would* they come." (A. 527.) He continued (A. 536):

> "But he was so sure every step of the way, *insulated, please, from you ladies and gentlemen,* so he feels free to go ahead and operate because he has got Michael Carioscia out in front to handle the hot stuff. That is why he felt he could go ahead with it. *The slick Bill Wright carefully insulating himself against any evidence from that witness stand.*"

The Court of Appeals concluded that this argument was not intended to convey an improper insinuation to the jury that the defendant had not testified and that the entire language "was a general comment on the fact that the government evidence was totally unrefuted" by William Wright.

There was no evidence against William Wright, as his counsel has heretofore pointed out, for either him or any other witness to deny or refute and the argument was, therefore, improper and prejudicial.

Implicit in this argument of Government Counsel is the idea that there were witnesses in New York and elsewhere *available* to defendant, who were asked to "come," but refused.

Petitioner's attorney, after a long search, could not find any case which directly discussed this type of argument.

However, a somewhat similar situation exists in the case of *Ginsberg* v. *United States*, 5 Cir., 1958, 257 F. 2d 950. This was a prosecution for income tax evasion. The defendant produced four character witnesses. During the argument to the jury, the Government Attorney stated that he had fifty witnesses available to contradict the defendant's four character witnesses. The Court of Appeals held (pp. 954-5) that this constituted such plain error affecting substantial rights as could be noticed by the reviewing court, although not brought to the attention of the trial court, and the argument made it so unlikely that the defendant could be given a fair trial that the error justified reversal of the conviction.

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

5.

The Petitioner filed a motion in arrest of judgment pointing out that there was a misjoinder of defendants in the ten counts which charged different and separate persons with the commission of different and separate crimes at different and separate times to the prejudice of the defendant, William Wright (A. 22-23). The trial court denied the motion (A. 28).

The petitioner had filed, prior to trial, a motion to dismiss the indictment on the ground that it charges ten distinct felonies committed by different persons which did not result from the same series of facts and which were not proveable by the same evidence (A. 11-12). The trial court denied this motion (A. 14).

The Court of Appeals held:

> "Finally, we come to defendant's contention that there was prejudicial misjoinder of substantive counts in the indictment in that other codefendants were charged with separate offenses not participated in by defendant. For this contention to be valid, the conspiracy count, the connecting link of the substantive counts in the indictment, must have failed for lack of proof. Since the conspiracy was proved, this contention of necessity must fail. See Rule 8, F. R. Crim. P."

Petitioner's attorney has heretofore shown that there was a failure on the part of the Government to prove the conspiracy count as to Wright beyond a reasonable doubt. What then becomes of his motions to dismiss and in arrest of judgment? Without this count, the motions should have been allowed.

If, as contended by petitioner, the conspiracy count was not proved as to him, Rule 8(b) of the Federal Rules of Criminal Procedure applies to his complaint. This rule provides:

> "Joinder of Defendants. Two or more defendants may be charged in the same indictment or information *if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.* Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." (Italics supplied)

This Court, in *McElroy v. United States*, 160 U.S. 60, 80, said:

> "The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and, in our opinion, they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they are substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."

And again at page 81, the Court continued:

> "While the general rule is that counts for several felonies of the same general nature requiring the same mode of trial and punishment, may be joined in the same indictment subject to the power of the court, to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all of the defendants may not have been embarrassed or prejudiced in their defense, or that the attention of the jury may not have been distracted to their inquiry in passing upon distinct and inadequate transactions."

No allegation appears in the indictment, or in any count thereof, alleging that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, as required by *McElroy* or the aforesaid Rule 8(b) of the Federal Rules of Criminal Procedure. Because of this omission the motion should have been sustained.

Since there was no evidence to sustain the conviction of William Wright on the conspiracy count, he should have the same benefit from the prejudicial joinder of the sub-

stantive crimes as he would have had if no conspiracy count appeared in the indictment. The Government should have known that they had no evidence to prove Wright's connection with the conspiracy count. Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 452, stated:

> "... it is for prosecutors rather than the courts to determine whether to use a scatter-gun to bring down the defendant, but there are procedural advantages from using it which add to the danger of unguarded extension of the concept."

The importance of the foregoing argument lies in the fact that it presents an important question of Federal law which has not been, but should be, settled by this Court.

6.

Government counsel made numerous prejudicial remarks to the jury, as follows:

1. The reference that out of 170,000,000 people "not one witness took that stand to refute the Government's case. Not from New York or anywhere would they come." (A. 527.)

2. The misstatement of the conversation between Theisen and Carioscia at the Steak House bar to the effect that Carioscia tapped his finger on the bar indicating "the man" is on the premises, when in fact Carioscia said "the man was right there and he pointed to the bar." (A. 50.)

3. Although defendant's attorney quoted this conversation accurately (A. 513), Government Counsel accuses him of twisting "a slight fact" (A. 532).

4. An erroneous statement of this conversation appears (A. 494), where Government Counsel argues that Theisen testified Carioscia used his index finger, hitting the top of

the bar at the Steak House, indicating that the man was in the building and not at the bar.

5. The grossly prejudicial argument reflecting on the integrity of Wright's attorney and suggesting unethical conduct on his part argued by Becco to the jury (A. 534).

> "They refer to a paper not in evidence, marked for identification, a document he pulled out of the file. *If we should do that they would jump on us, let us know about it that it was not in evidence.* Now he referred to it, and for what? For what? I ask you to apply your common sense again. Moving away, or saw the car driving away? Now, so help me, what is the difference between the two statements? A big deal." (Emphasis supplied.)

Mr. Gladstone's conduct was proper and in the interest of his client. The paper disclosed that Durkin stated under oath that William Wright *was seen* to drive away in a 1956 Oldsmobile (A. 363), whereas Durkin testified at the trial that *he* saw Wright start his car (A. 339). The distinction becomes apparent when Durkin answers "It's a little hairsplitting" to the question "You didn't see him drive away, did you?" (A. 363.) Since Durkin admitted the contents of the paper, it was unnecessary to introduce it in evidence.

6. The following remark (A. 530) was also unwarranted and aggravated the assault on Mr. Gladstone's version of the conversation:

> "You will notice very carefully there is a common tactics when there is no defense to a case that what is good for them is the truth and what is not good for them is a lie by Government witnesses. This is used universally by all defense counsel, defense counsel in a case where they fail to have a defense to a factual situation."

7. The two references by Government Counsel that Mr. Gladstone argued the law to the jury after Benjamin Pennacelli's attorney objected to Mr. Becco's arguing the law to the jury (A. 529-530; 539).

8. The statement to the jury that Wright was the supplier of the heroin (A. 526-527).

9. The two appeals to the passions of the jury with reference to the effect of heroin on the population (A. 477; 538-539).

The Court of Appeals penalized the defendant because his counsel did not move for a mistrial after the trial court instructed the jury to disregard improper conduct of the prosecutor. The Government should not be permitted to retain the fruits of a victory obtained by assaulting the integrity of defendant's counsel, by misstating facts to the jury and by making prejudicial and inflammatory remarks to the jury.

The Court of Appeals stated that it examined each instance of claimed prejudicial conduct and are unable to see how any of them would warrant a conclusion that the jury's verdict may have been influenced thereby. This holding is in conflict with the opinion of this Court in *United States* v. *Berger*, 295 U.S. 78, 85-89.

CONCLUSION.

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MYER H. GLADSTONE,
Attorney for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 13572 SEPTEMBER TERM, 1962 SEPTEMBER SESSION, 1962.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. WILLIAM WRIGHT, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 31, 1962

Before DUFFY, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Defendant, William Wright, appeals from a judgment sentencing him to a term of imprisonment. He was convicted by a jury on three counts of an eleven count indictment charging violation of the Federal Narcotic Laws. Two of these three counts charged defendant and one Michael Carioscia with receiving, concealing, facilitating the transportation of and selling a quantity of heroin in violation of 21 U. S. C. § 174 and 26 U. S. C. § 4705(a). The third count charged a conspiracy to violate § 174, *supra,* by defendant and codefendants Carioscia, Armando Pennacchio, and Ben Pennacchio. Armando Pennacchio and Carioscia pleaded guilty. Ben Pennacchio was found not guilty by the jury.

Defendant contends that the evidence was not sufficient to support his conviction. Consideration of this contention requires a summary of the facts.

During the year 1960 defendant resided in Coytesville, New Jersey. Between February 17 and March 24, 1960 there were six long-distance telephone calls to defendant's wife's unlisted telephone in Coytesville from Armando Pennacchio's telephone in Chicago.

On March 16, Carioscia and Armando Pennacchio sold 120 grams of heroin to Federal Narcotics Agent Theisen. On March 31, defendant and Carioscia traveled from Chicago to New York under assumed names. On April 28, Carioscia sold 75 grams of heroin to Agent Theisen. The next day there was a telephone call from Armando Pennacchio's residence to defendant's residence in New Jersey.

On May 25, defendant registered at The Country Club Motel, Melrose Park, Illinois, under the assumed name "J. Harris." On May 28, Agent Theisen with Oscar Luna, a special employee of the Federal Bureau of Narcotics, talked with Carioscia at the bar of The North Avenue Steak House, Chicago. Theisen told Carioscia that he did not have the full price for a quarter kilogram of heroin and asked if he could get the heroin and pay later. Carioscia said he would have to talk to his "man" about it, and that "the man's right here." Theisen and Luna then left the Steak House, whereupon Carioscia entered the restaurant section of the establishment and talked to defendant. Wright later left with Carioscia in the latter's car and went to The Country Club Motel. About noon Carioscia telephoned Agent Theisen that he had talked to the "guy" right after Theisen and Luna left the night before and the arrangements were off. The following day there were calls from

Wright's motel room to the residence of Carioscia and Benjamin Pennacchio. Defendant checked out of The Country Club Motel on June 2.

On June 6, Carioscia told Agent Theisen that he wasn't sure they had enough heroin on hand, and the following day Armando Pennacchio told Theisen they were temporarily "out" and would call when they got enough "to take care of the business." On June 13, defendant again registered at The Country Club Motel under the assumed name "J. Harris."

On June 16, Carioscia called Agent Theisen to make arrangements for another sale of heroin. Theisen told him that he had the money and was ready to do business. Carioscia said he would call between 8:30 and 9:00 p.m. At approximately 7:00 p.m. Carioscia left his residence in his Pontiac. At 8:00 p.m. this car was observed in the parking lot at The North Avenue Steak House and twenty minutes later defendant and Carioscia were seen seated together at the bar. Shortly thereafter, Wright left the Steak House, entered an Oldsmobile and was seen pulling out of the lot. He returned within an hour, walked up to Carioscia, handed him some keys, and said "Everything is O. K." Carioscia went to the telephone, returned and told Wright that the phone was busy. Carioscia telephoned again, and talked with Agent Theisen who had been awaiting his call. He told Theisen to go to The Lake Club in Melrose Park; Carioscia then left the Steak House. Although his Pontiac was still in the lot, Carioscia drove away in the Oldsmobile and later met Theisen at The Lake Club where he delivered 235 grams of heroin.

Meanwhile, at the Steak House defendant paced back and forth, glanced out the door, walked outside, returned, and finally entered the restaurant section. About 10:15 p.m.

Carioscia returned, looked around the bar, walked to the restaurant section, stood, nodded his head, and entered the restaurant where he talked with defendant. Carioscia then left in his Pontiac. Two days later defendant checked out of The Country Club Motel.

On July 7, 14, and 15, there were long-distance telephone calls from Armando Pennacchio's residence to defendant's residence in New Jersey.

On July 26, Carioscia told Agent Theisen that he was not then in a position "to do business," but asked him to check back the first part of August. On August 4, there were three long-distance telephone calls from Carioscia's residence to defendant's residence. On August 6, there was a long-distance telephone call from Armando Pennacchio's residence to Wright's. On August 27, Armando Pennacchio told Theisen that Caroscia and "that other guy" had lost the "stash" and had practically destroyed him in the last several weeks, but that he could supply a "kilogram and a half." On August 29, Armando Pennacchio delivered 198 grams of heroin to Theisen and on September 6, 407 grams.

On September 12, a short time after his arrest, defendant expressed surprise to Agent Theisen at the degree of surveillance to which he had been subjected by the federal agents during the course of the government's investigation. He also registered an apparent complaint against one of his codefendants by saying, "He never did use his mind. • • • I told that guy to watch you. I told him then you were an agent." Defendant then asked Theisen, "How much stuff did they get Monsie (Armando Pennacchio) with?"

A review of the evidence convinces us that it is sufficient to warrant the jury's verdict of guilty on both the substantive and the conspiracy counts.

It is true that no one saw defendant handle any heroin. However, as was stated in *United States* v. *Rossi*, 219 F. 2d 612, 614 (2nd Cir. 1955):

> "The courts have held again and again in the narcotics cases that it is not necessary for the government to produce a witness who saw the package, containing narcotics handed over. * * * Otherwise it would never be possible to convict those who participate in this despicable business, each of whom is continually on the alert against the possibility of detection and apprehension."

The jury was justified in inferring from the short trip by Wright in the Oldsmobile on June 16, followed by the calls to Agent Theisen by Carioscia, and then the taking of the Oldsmobile by Carioscia to The Lake Club to make the sale, that Wright had originally left to pick up the heroin, had hidden it in the Oldsmobile (and referred to this fact when he tossed the keys to Carioscia and said "Everything is O.K."), and that Carioscia took the Oldsmobile with the heroin to The Lake Club for the sale to Theisen. We find nothing unreasonable in such an inference when the facts are viewed in their totality.

Next we consider defendant's contention that the government attorneys made prejudicial and inflammatory remarks to the jury, distorted the evidence, and reflected upon the integrity and conduct of defendant's attorney. We have examined each instance of claimed prejudicial conduct and are unable to see how any of them would warrant a conclusion that the jury's verdict may have been influenced thereby. In those few instances where there may have been some doubt, the trial court sustained objections to the comments of the prosecutors.

Furthermore, defendant did not move for a mistrial. It has generally been held that improper conduct of a prosecutor does not require a reversal where the trial court properly instructs the jury to disregard it and where the defendant fails to pursue the matter by moving for a mistrial. *Gerard* v. *United States*, 61 F. 2d 872 (7th Cir. 1932).

Defendant also contends that reversable error resulted from government counsel's alleged reference to defendant's failure to testify in his own behalf.[1] The Supreme

---

[1] This arises out of the following exchange during the closing argument by government counsel to the jury:

Government Counsel: "Every act in this case has been designed by these two defendants with you in mind. How do I mean that? Every act, every transaction, every declaration is designed 'That if we get caught, how we have insulated ourselves from the ladies and gentlemen of the Federal Jury in this courtroom? How have we done that?'

"Now keep in mind that nothing I have said, or anything that the other attorneys have said in this case is evidence. You heard the evidence from the witness stand under oath, and as to Defendant William Wright it is unrefuted and undenied. Out of one hundred and seventy million people in the United States not one witness took that stand to refute the Government's case. Not from New York or anywhere they would come."

Defense Counsel: "Just a minute. Your Honor, I want to object to that statement when he says no witness took that stand for Mr. Wright. That includes him and that is an improper remark."

* * * * *

The Court: "I understand but the jury is going to be instructed to the fact that Mr. Wright did not take the stand and that cannot be considered against him. It is not necessary for him o take the stand if he doesn't want to."

Later, in the closing argument, government counsel addressed the jury:

"But he was so sure every step of the way, insulated, please, from you ladies and gentlemen, so he feels free to go ahead and operate because he has got Michael Carioscia out in front to handle the hot stuff. That is why he felt he could go ahead with it. The slick Bill Wright carefully insulating himself against any evidence from that witness stand."

Court has held that the Fifth Amendment and 18 U. S. C. § 3481 preclude any comment or argument about a defendant's failure to take the stand in a criminal trial. *Stewart* v. *United States*, 366 U. S. 1 (1961). This rule, however, must be interpreted in the light of reason and it must appear that "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955). We are in accord with what was said in *Langford* v. *United States*, 178 F. 2d 48, 55 (9th Cir. 1949):

> "[E]xcept in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony, . . . the prosecutor may properly call attention to the fact that the testimony of the government witness has not been contradicted."

We cannot agree that the language of government counsel under attack was manifestly intended to convey or would have naturally conveyed an improper insinuation to the jury. The language was a general comment on the fact that the government evidence was totally unrefuted. Defendant was not the only one who could have contradicted the government's testimony. The evidence shows that others were present during several of the conversations or incidents relied on by the government in support of its case against defendant.

In any event, we feel that one of the court's instructions[2]

---

[2] "The fact that a defendant did not testify in his own behalf in this case does not create any presumption against him, and the jury must not permit that fact to have the slightest influence in arriving at a verdict." (Defendant's Instruction No. 20.)

was sufficient to correct any misinterpretation that may have resulted from the comments of government counsel. It is pertinent here to recall what Judge Augustus Hand said in *United States* v. *DiCarlo*, 64 F. 2d 15, 18 (2nd Cir. 1933):

> "We should be blind to realities if we supposed that juries are unconscious of the omission of a defendant to take the stand, and we think the express instruction to the jury in this case, that this fact must not prejudice the defendant, did all that could ever be done to prevent the consideration by them of the omission in arriving at their verdict."

Finally, we come to defendant's contention that there was prejudicial misjoinder of substantive counts in the indictment in that other codefendants were charged with separate offenses not participated in by defendant. For this contention to be valid, the conspiracy count, the connecting link of the substantive counts in the indictment, must have failed for lack of proof. Since the conspiracy was proved, this contention of necessity must fail. See Rule 8, F. R. Crim. P.

The judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

(JUDGMENT OF COURT OF APPEALS)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, October 31, 1962

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

United States of America, *Plaintiff-Appellee,* vs. William Wright, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13572	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

(ORDER DENYING REHEARING)
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Wednesday, December 12, 1962
Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 13572 *vs.*

William Wright,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, Denied.

APPENDIX D

CONSTITUTION, RULES AND STATUTES INVOLVED

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES

No person * * * shall be * * * deprived of life, liberty or property without due process of law.

FEDERAL RULES OF CRIMINAL PROCEDURE
Title 18, U.S.C.

Rule 8(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information *if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.* Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (Emphasis ours.)

Rule 37(a) Taking Appeal.

(1) Notice of Appeal.

An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate.

Rule 52(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SECTION 1291, TITLE 28, U.S.C.

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

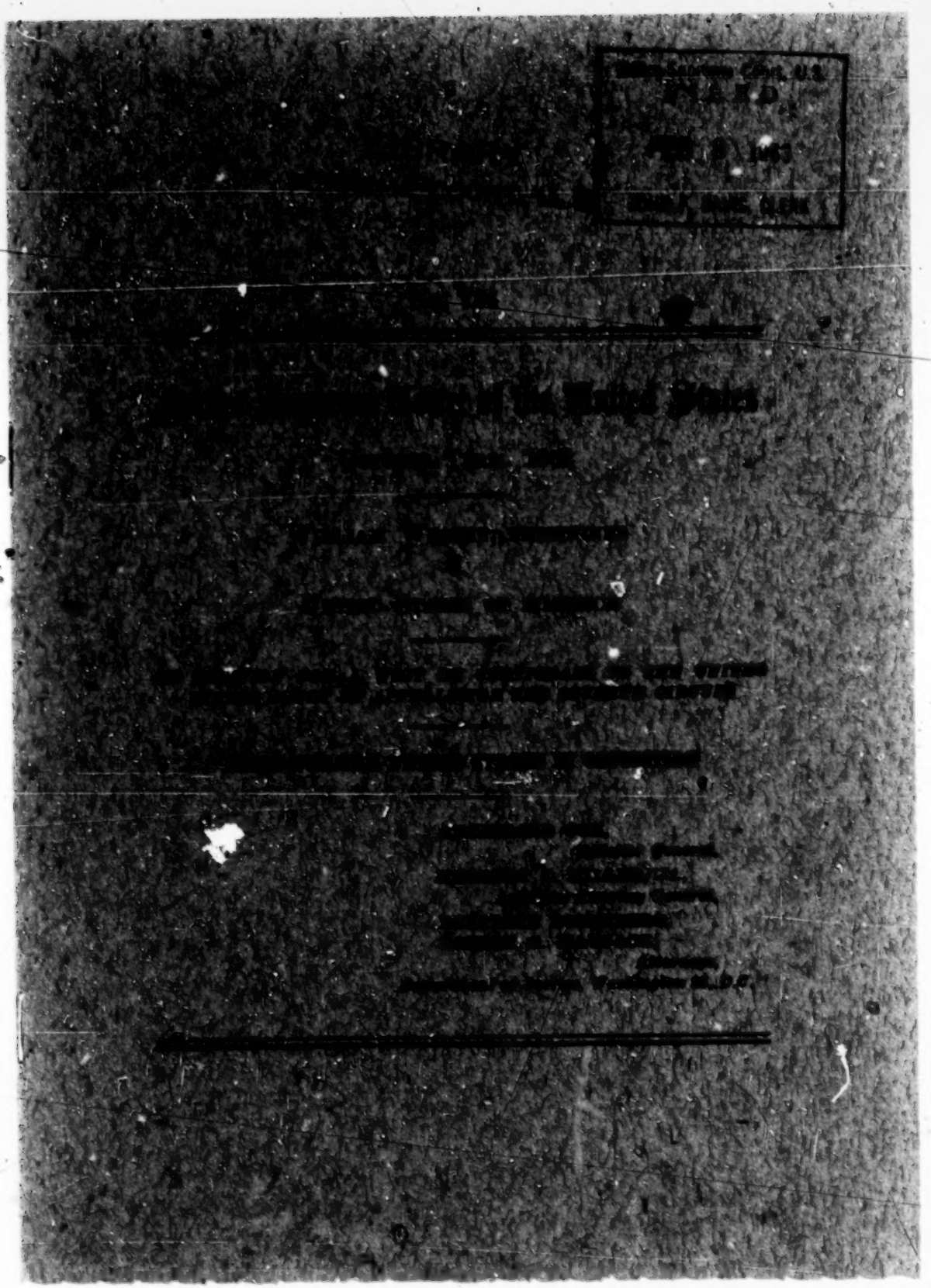
SECTION 174, TITLE 21, U.S.C.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States shall be imprisoned not less than or more than twenty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this Section, the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

SECTION 4705(a) TITLE 26, U. S. Code

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is resold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.



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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 734

WILLIAM WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1962 (Pet. App. 9). A petition for rehearing was denied on December 12, 1962 (Pet. App. 10). The petition for a writ of certiorari was filed on January 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether there was a proper joinder of counts charging both substantive offenses and a conspiracy.

3. Whether remarks made by the prosecutor were improper.

STATEMENT

Petitioner and Michael Carioscia were charged in Count 5 of an indictment returned in the United States District Court for the Northern District of Illinois with the unlawful sale of heroin on June 16, 1960, without a written order form in violation of 26 U.S.C. 4705(a), and in Count 6 with receiving, concealing, and facilitating the transportation of this heroin after unlawful importation in violation of 21 U.S.C. 174 (R. 5–6). Petitioner, together with Armando Pennacchio, Ben Pennacchio, and Carioscia, were charged in Count 11 with a conspiracy to violate 21 U.S.C. 174 (R. 8–9). Counts 1, 2, 3, 4, 7, 8, 9, and 10 charged various substantive violations of 26 U.S.C. 4705(a) and 21 U.S.C. 174 by Armando Pennacchio, Ben Pennacchio, and Carioscia (R. 4–5, 6–8). Armando Pennacchio and Carioscia pleaded guilty before trial (R. 402). The jury found Ben Pennacchio not guilty on all counts in which he was named, *i.e.*, 7, 8, 9, 10, and 11 (R. 20). Petitioner was found guilty on Counts 5, 6, and 11 (R. 21–22), and was sentenced to imprisonment for five years (R. 27–28). On appeal (R. 29–30), the conviction was affirmed (Pet. App. 9).

1. Prior to trial petitioner filed a motion to dismiss the indictment on the ground of misjoinder since the charges in Counts 1–4 and 7–10 were not provable by the same evidence and did not result from the same

series of facts charged in Counts 5 and 6. The court denied this motion (R. 11–12, 14). After conviction petitioner filed a motion in arrest of judgment, alleging that the government had not proved the conspiracy charged in Count 11 and hence that there had been an improper joinder. The court also overruled this motion (R. 22–23, 28).

2. Evidence adduced at the trial showed that on March 16, 1960, Carioscia and Armando Pennacchio sold heroin to federal narcotics agent Theisen in Chicago for $3,360 (R. 44–49, 54–57, 393). On March 31, petitioner and Carioscia, under assumed names, flew from Chicago to New York (R. 211–213, 239, 240). On April 19, Armando Pennacchio told agent Theisen that he and Carioscia had been followed lately, and that things had not been going too well, but that if he had "that other guy" they could do business with Theisen (R. 64–65). On April 28, Carioscia sold 75.62 grams of heroin to agent Theisen in Chicago for $1,200 (R. 68–70, 394). On April 29, there was a long-distance telephone call from Armando Pennacchio's residence in Chicago to petitioner's residence in New Jersey (R. 37).[1]

On May 25, petitioner registered at the Country Club Motel, Melrose Park, Illinois, Room 101, under the assumed name "J. Harris," and on that date a telephone call was placed from the petitioner's room to Armando Pennacchio's residence (R. 37, 38, 367,

[1] Petitioner lived at Fort Lee, New Jersey, where his wife had an unlisted telephone number (R. 36, 264–265, 272, 335–336). Between February 17 and March 24, 1960, there were six long-distance calls to the number of petitioner's wife from the Chicago telephone number of Armando Pennacchio (R. 37).

378–379, 373). On May 28, 1960, agent Theisen, who was with special employee Luna at the bar section of the North Avenue Steak House, asked Carioscia whether he (Theisen) could pay $2,300 of the $3,750 price for a quarter kilo of heroin which Carioscia was demanding and pay the balance in a few days. Carioscia answered that "he would have to talk to his man about it, that the man was right there, and he pointed to the bar * * *" (R. 74–76, 45).

Theisen and Luna left at about 1:40 a.m. (R. 76, 152, 153). Carioscia then entered the restaurant part of the Steak House, sat down with petitioner and three other men, and had a conversation with them (R. 153–154). At about 3:40 a.m., Carioscia and petitioner drove to the Country Club Motel (R. 154). At about noon the same day Carioscia telephoned Theisen to say that he had talked to "the guy" right after Theisen and Luna walked out the night before, and the consignment deal was off, cash being required (R. 76, 77). On May 29, there was a telephone call from petitioner's motel room to the residence of Carioscia (R. 374, 37–38). On June 2, petitioner checked out of the Country Club Motel (R. 38).

On June 6, 1960, Carioscia told Theisen that he was not sure he had enough heroin on hand to do business. On the following day Armando Pennacchio informed Theisen that they were "temporarily out," but that he would call within the next few days when they had enough heroin to take care of the business (R. 77–78). On June 13, petitioner again registered at the Country Club Motel under the assumed name "J. Harris" (R. 39, 367, 368, 378–379). On June 16,

1960, when Carioscia telephoned Theisen to arrange for another sale, Theisen said he had all the money and was ready to do business. Carioscia promised to call back between 8:30 and 9:00 p.m. (R. 78–79). At 7:00 p.m., Carioscia left his residence and an hour later his car was observed on the parking lot of the North Avenue Steak House (R. 215–216, 251). At about 8:20 p.m., petitioner and Carioscia were seated together at the bar (R. 338). Shortly after 8:30 p.m., petitioner left the Steak House, entered a 1956 Oldsmobile, and began to pull out of the parking lot (R. 339, 360, 362). When petitioner returned at about 8:55 p.m., he walked up to Carioscia, gave him some keys, and said, "Everything is okay" (R. 339, 361). Carioscia made several attempts to make a telephone call and informed petitioner that the line was busy. (R. 339–340). At about 9:15 p.m., Carioscia telephoned agent Theisen and told him to go to the Lake Club in Melrose Park (R. 79–80). Then Carioscia drove away from the Steak House in the 1956 Oldsmobile and left his own car in the parking lot (R. 340, 262–263). Carioscia met Theisen at the Lake Club and delivered 235.5 grams of heroin for $3,500 (R. 80–81, 394–395). Meanwhile, at about 9:45 p.m., petitioner began walking back and forth at the Steak House for about thirty minutes, looking outside and returning, and then entering the restaurant section (R. 340). At 10:15 p.m., upon Carioscia's return in the Oldsmobile, he looked around the bar, walked over to the restaurant section, nodded his head, and entered the restaurant where he was observed talking with petitioner (R. 219, 341). At 10:50 p.m., Cari-

oscia left the Steak House in his Pontiac (R. 220, 253). Two days later on June 18, petitioner checked out of the Country Club Motel (R. 39).

On July 7, 14, and 15, 1960, long-distance telephone calls were placed from Armando Pennacchio's Chicago residence to petitioner's New Jersey residence (R. 37). On July 25, and 26, Carioscia informed agent Theisen that he was not then in a position to "do business," but that he should check with him again the first part of August (R. 84–85). On August 4, there were three long-distance telephone calls from Carioscia's Chicago residence to petitioner's New Jersey residence (R. 37–38). On August 6, there was another such call from Armando Pennacchio's residence to petitioner's residence (R. 37). On August 27, Armando Pennacchio informed Theisen that Carioscia and "that other guy" had lost the "stash" and had practically destroyed him (Armando Pennacchio) in the last several weeks, but that he could take care of delivery of a kilogram and a half (R. 87–88). On August 29, Armando Pennacchio delivered 197.8 grams of heroin to agent Theisen for $3,750, and on September 6, the date of his arrest, he delivered 407.49 grams of heroin (R. 88–90, 97–100, 395, 396).

On September 12, 1960, when petitioner was complaining to agent Theisen at the United States Marshal's office, that he had nothing to do with the case, petitioner stated, "That guy is a real * * * yo-yo. He never did use his mind." Petitioner remarked, "I haven't seen him in about four months," and Theisen said, "That's about right." Petitioner suggested that the agents could probably pinpoint the exact day, and

Theisen answered that he thought they could. Petitioner stated, "I told that guy to watch you. I told him then you were an agent." Petitioner then asked, "How much stuff did they get Monsie [the alias of Armando Pennacchio] with?" Theisen told the petitioner that "we had got him with a key in hand" (R. 115–116).

ARGUMENT

1. Petitioner argues that, in affirming the conviction, the court of appeals did not give sufficient weight to the evidence favorable to him. His argument is a repetition to arguments he made to the jury, and really amounts to no more than an assertion that the jury should have resolved every issue of credibility in his favor.[2] As appears from the Statement, the evidence which the jury had the right to credit amply supports the verdict.

2. Petitioner's claim that there was an improper joinder of offenses is based on his contention that there was no evidence to show that he was a member of the conspiracy. The jury, however, found to the contrary and this conclusion is fully supported by the

[2] The question as to where Carioscia pointed when, on May 28, he said his man was right there and pointed to the bar (see Pet. 12–15) was argued to the jury (R. 494, 513, 532) and was not significant in the light of the total evidence. As to the events on June 16, petitioner argued to the jury, as he does here (Pet. 15–18), that if agent Durkin could have seen petitioner leave the restaurant, surveilling agents watching the entrance would have seen Durkin (see R. 515–517). The jury evidently believed Durkin's testimony that he went to the inner entrance door and that he did not know if the other agents could see him since they would be looking through two thicknesses of glass (R. 360–361). Durkin did not testify, as petitioner states (Pet. 17), that he put his head out of the door (see R. 339).

evidence (see the Statement, *supra*, pp. 3–7). At the very least, the evidence demonstrates that the grand jury had a reasonable basis for charging a conspiracy; consequently, there would have been no prejudicial misjoinder even if the jury had acquitted petitioner on the conspiracy count. *Schaffer* v. *United States*, 362 U.S. 511.

3. *a.* During his closing argument to the jury, government counsel stated (R. 527):

> Every act in this case had been designed by these two defendants with you [in] mind. How do I mean that? Every act, every transaction, every declaration is designed "That if we get caught, how we have insulated ourselves from the ladies and gentlemen of the Federal Jury in this court-room? How have we done that?
>
> Now keep in mind that nothing I have said, or anything that the other attorneys have said in this case is evidence. You heard the evidence from that witness stand under oath, and as to Defendant William Wright it is unrefuted and undenied. Out of one hundred and seventy million people in the United States not one witness took that stand to refute the Government's case. Not from New York or anywhere they would come.
>
> Mr. GLADSTONE [petitioner's counsel]: Just a minute. Your Honor, I want to object to that statement when he says no witness took that stand for Mr. Wright. That includes him and that is an improper remark.
>
> * * * * *
>
> The COURT. I understand but the jury is going to be instructed to the fact that Mr.

> Wright did not take the stand and that cannot be considered against him. It is not necessary for him to take the stand if he doesn't want to.

In its charge to the jury the court said (R. 542):

> The fact that a defendant did not testify in his own behalf in this case does not create any presumption against him, and the jury must not permit that fact to have the slightest influence in arriving at a verdict.

This is not a case where "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States,* 224 F. 2d 168, 170 (C.A. 10). On the contrary, as the court below held (Pet. App. 7), the prosecutor's remarks could not reasonably be construed by the jury as a comment on the failure of petitioner to testify. The statement, "Not from New York or anywhere they would come," demonstrates that the prosecutor was referring to other witnesses since petitioner was already present in the courtroom. Thus, the prosecutor was merely stating that petitioner had offered no evidence to contradict that of the government, a comment which is plainly proper. *Langford* v. *United States,* 178 F. 2d 48, 55 (C.A. 9). Moreover, the court's charge that petitioner's failure to testify created no presumption against him, and must not be considered, cured any possible misinterpretation of the prosecutor's comments in summation. See *United States* v. *Di Carlo,*

64 F. 2d 15, 17–18 (C.A. 2); *United States* v. *Shapiro*, 103 F. 2d 775 (C.A. 2).[3]

b. The other remarks about which petitioner now complains (Pet. 27–29) were not objected to at the trial and represent an attempt to find error in a record which fully supports the finding of guilt. Cf. *United States* v. *Goodman*, 110 F. 2d 390, 394 (C.A. 7). Since petitioner did not make timely objections, he has the burden of showing on appeal that the trial court's failure to take some remedial action constituted clear error of substantial prejudice to his case. See Rule 52, F.R. Crim. P. Instead, the remarks quoted by petitioner show on their face that they were well within the limits of permissible advocacy.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1963.

[3] This case is not at all similar to *Ginsberg* v. *United States*, 257 F. 2d 950 (C.A. 5), in which the government attorney made an improper remark based upon pure conjecture that he probably could have produced fifty witnesses to show that the defendant was not of good character, after the defendant had introduced four character witnesses. Here the prosecutor made no conjectural statements as to what evidence witnesses not produced could give on behalf of the government.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 734

WILLIAM WRIGHT,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

A vital concession is made by Government counsel at page four of their brief. This is with respect to the events of May 28, 1960, on which date agent Theisen, who was at the bar section of the North Avenue Steak House, asked Carioscia whether he could pay Carioscia $2,300 of the $3,750 price for a quarter kilo of heroin and pay the balance in a few days. The Government concedes that Carioscia replied "he would have to talk to his man about it, *that the man was right there, and he pointed to the bar* • • •."

In their argument Government counsel avoid any reference to the difference between the foregoing accurate statement of Carioscia and the version thereof given by the Justices of the Court of Appeals who recited Carioscia's reply to Theisen as, he "would have to talk to 'his man' about it, and that 'the man's right *here*.'" The resulting effect of the two conflicting statements is argued in the petition at pages 12 to 15; the only answer of the Government to Petitioner's argument is that the matter was argued to the jury and was not significant in the light of the total evidence. The significance of the statement and its prejudicial effect is fully presented in the Petition at pages 12 to 15 and will not be repeated here.

2.

With respect to the conflict of testimony between Agent Durkin on one hand and Agents Taylor and Maxfield on the other hand regarding the occurrences at the Steak House on the evening of June 16, 1960, the Government answers Petitioner's argument by calling it a repetition of his attorney's arguments to the jury and that it really amounts to no more than an assertion that the jury should have resolved every issue of credibility in his favor. The arguments of counsel to the jury are not final and are not dispositive of the case. In its footnote to its argument (p. 7) the Government states that the jury evidently believed Durkin's testimony that he went to the inner entrance door and that he did not know if the other agents could see him since they would be looking through two thicknesses of glass.

Whether Durkin knew that the other agents could see him or not is not conclusive of the conflict of testimony between Durkin and two other agents. The conflict of testimony is not confined to whether Durkin stuck his head

out of the door; the more vital conflict is in the testimony of Durkin that he saw the Petitioner, William Wright, leave the entrance of the Steak House and walk over to an Oldsmobile, and that he saw Wright driving away in the Oldsmobile. However, Agents Maxfield and Taylor, who had the entrance of the Steak House under observation, did not see Wright leave the Steak House and drive away in the automobile.

Government counsel state that Durkin did not testify, as Petitioner states, that he put his head out of the door. The Oldsmobile, according to Durkin, was parked 40 feet to the left of the entrance of the Steak House as one entered, or 40 feet to the right of the entrance of the Steak House as one looked out. How could anyone see this Oldsmobile parked 40 feet from the entrance from the *inner* door? The angle would make it impossible. It could only be seen by one looking out of the *front* door and turning his head to the right.

The conflict of testimony is not between a Government witness and Petitioner's witnesses; it is between Government witnesses. The Government's position is the same taken by it in the case of *Jones* v. *United States*, 362 U.S. 257, 272, 80 S.Ct. 725, 737, in which the conflict was between the Government's testimony and the defendant's testimony. The manner of executing a search warrant was involved. The Supreme Court stated:

> "The trial revealed a direct conflict in testimony on this matter. We cannot yield to the Government's suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution. We, therefore, vacate the decision of the Court of appeals and remand the case to the District Court to consider petitioner's contention under 18 U.S.C. §3109, in light of our decision that petitioner had standing to make it."

3.

The Government cites *Schaffer* v. *United States*, 362 U.S. 511, in answer to Petitioner's argument (pages 24, 27 of Petition) on the question presented:

> "Where the Government fails to prove beyond a reasonable doubt that the defendant was guilty of the conspiracy charged in one of the counts is it not error to deny a motion in arrest of judgment pointing out that there was a misjoinder of defendants in the ten counts charging independent substantive crimes committed by the four defendants?"

In *Schaffer* it appeared that each defendant did one or more acts with reference to the charge in each count. The situation is quite different in Petitioner's case and is like the situation recited in *McElroy* v. *United States*, 160 U.S. 60, 80, where the charges were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together. They were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times, and not provable by the same evidence.

The telephone calls between some of the co-conspirators and Petitioner, the association of Carioscia and Petitioner may arouse speculation, conjecture and suspicion, but this is not evidence as pointed out by the attorney for Mr. Wright in his Petition.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that two or more defendants may be charged in the same indictment "if they are *alleged* to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The word "alleged" has definite meaning, and no such allegation as is required by this Rule appears in the instant indictment.

4.

Government counsel answer Petitioner's complaint with respect to the prosecutor's argument to the jury that the Government's testimony as to William Wright is unrefuted and undenied and that "Out of one hundred and seventy million people in the United States not one witness took the witness stand to refute the Government's case. Not from New York or anywhere *would* they come." (R. 527)

This argument was more than a mere reference that the Petitioner had offered no evidence to contradict that of the Government. This argument pointed out that there were witnesses in New York and elsewhere *available* to the Petitioner, and they were asked to "come" but refused. This analysis is not answered by Government counsel, who argue that the case cited by Petitioner, *Ginsberg* v. *United States*, 5 Cir., 1958, 257 F. 2d 950, is not in point. The Government disposes of *Ginsberg* by stating that it was an improper remark based upon *pure* conjecture and that Government counsel probably could have produced fifty witnesses to show that the defendant was not of good character, after defendant had introduced four witnesses. In Petitioner's case the argument was that "Not from New York or anywhere *would* they come" (meaning witnesses in behalf of Petitioner). This is all pure conjecture even more serious than that in *Ginsberg*. It pointed out by conjecture that Petitioner had witnesses "from New York or anywhere" but they wouldn't come to testify at the trial to refute the Government's evidence.

It is interesting to note that in *Ginsberg* the Court of Appeals held that the Government's argument constituted such plain error affecting substantial rights as may be noticed by the reviewing court, although not brought to the attention of the trial court.

5.

Government counsel argue that "other remarks" about which Petitioner complains were not objected to at the trial. At pages 27-29 Petitioner lists nine points of error, to some of which, it is true, no objection was made. However, an accumulation of errors is reversible. *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683, 695; *United States* v. *Donnelly*, 7 Cir., 179 F. 2d 227, 233. A court of review will note plain error to which objection was not made at the trial. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160; *Brassfield* v. *United States*, 272 U.S. 448, 450; *Ginsberg* v. *United States*, 257 F. 2d 950, 954-955.

Respectfully submitted,

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